



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0692; FRL-9814-1]

Approval and Promulgation of Implementation Plans; Florida;

Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve in part, and disapprove in part, the State Implementation Plan (SIP) submission, submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on October 31, 2011, to demonstrate that the State meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2008 8-hour ozone national ambient air quality standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an “infrastructure” SIP. FDEP certified that the Florida SIP contains provisions that ensure the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida (hereafter referred to as “infrastructure submission”). EPA is now taking two related actions on FDEP’s infrastructure submission for Florida. First, EPA is proposing to disapprove in part portions of Florida’s infrastructure submission as it relates to the regulation of greenhouse gas (GHG) emissions. Second, EPA is proposing to determine that Florida’s infrastructure submission, addresses all other required infrastructure elements for the 2008 8-hour ozone NAAQS, with the exception of the

aforementioned portions and the requirement that the SIP include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures to protect visibility in another state.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2012-0692, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
 2. E-mail: R4-RDS@epa.gov.
 3. Fax: (404) 562-9019.
 4. Mail: "EPA-R04-OAR-2012-0692," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
 5. Hand Delivery or Courier: Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
- Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2012-0692. EPA's policy is that all comments received will be included in the public docket without change and

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Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth

Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Nacosta C. Ward, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9140. Ms. Ward can be reached via electronic mail at ward.nacosta@epa.gov.

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I. Background and Overview

On March 27, 2008, EPA promulgated a revised NAAQS for ozone based on 8-hour average concentrations. EPA revised the level of the 8-hour ozone NAAQS to 0.075 parts per million. *See* 77 FR 16436. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2008 8-hour ozone NAAQS to EPA no later than March 2011.

Florida's infrastructure submission was received by EPA on October 31, 2011, for the 2008 8-hour ozone NAAQS. FDEP's October 31, 2011, infrastructure SIP submission for the 2008 8-hour ozone NAAQS also addressed CAA section 110(a)(2)(D)(i)(I), which requires that SIPs contain adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment maintenance of the NAAQS in another state. On April 30, 2013, following the recent *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) decision, Florida withdrew its submission for section 110(a)(2)(D)(i)(I). This decision addressed the requirements of 110(a)(2)(D)(i)(I), and provided that a section 110(a)(2)(D)(i)(I) SIP submission cannot be considered a "required" SIP submission until EPA has defined a state's obligations pursuant to that section. *See EME Homer City*, 696 F.3d at 32 ("A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor

obligation.”) EPA historically has interpreted section 110(a)(1) of the CAA as establishing the required submittal date for SIPs addressing all of the “interstate transport” requirements in section 110(a)(2)(D), including the provisions in section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment and interference with maintenance. However, at this time in light of the *EME Homer City* opinion, EPA is not treating the section 110(a)(2)(D)(i)(I) SIP submission from FDEP as a required SIP submission. The *EME Homer City* opinion provides that EPA does not have authority to promulgate Federal Implementation Plan (FIP) to address the requirements of section 110(a)(2)(D)(i)(I) until EPA has identified emissions in a state that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state and given the state an opportunity to submit a SIP to address those emissions. *EME Homer City*, 696 F.3d at 28.

Additionally, Florida did not submit a SIP revision to adopt the appropriate emission thresholds for determining which new stationary sources and modification projects become subject to PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule. *See* 75 FR 31514, June 3, 2010. Therefore, Florida’s federally-approved SIP does not address or provide adequate legal authority for, the implementation of a GHG PSD program in Florida. Approval of a revision to address GHG is required to meet sections 110(a)(2)(C), D(i)(II), and (J) related to PSD. On December 30, 2010, EPA promulgated a FIP¹ under CAA section 110(c)(1)(A) for Florida to govern PSD permitting for GHG in the State. Since the Florida SIP currently does not provide adequate legal authority to address the new

¹ Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

GHG PSD permitting requirements at or above the emissions levels set in the GHG Tailoring Rule, or at other appropriate levels, it does not satisfy portions of the aforementioned infrastructure requirements. *See* 75 FR 82246. As a result, EPA is proposing disapproval in part portions of sections 110(a)(2)(C), D(i)(II) and (J) of Florida infrastructure SIP submission as related to GHG PSD permitting requirements. EPA's proposed disapproval of these elements does not result in any further obligation on the part of Florida, because, as described above, EPA has already promulgated a FIP for the Florida PSD program to address permitting GHGs at or above the GHG Tailoring Rule thresholds. Thus, today's proposed action to disapprove FDEP's submission for the PSD-related portions of sections 110(a)(2)(C), D(i)(II), and (J), once final, will not require any further action by either FDEP or EPA.

Today's action is proposing two related actions on Florida's October 31, 2011, submission. First, EPA is proposing to approve Florida's infrastructure submission² for the applicable requirements of the 2008 8-hour ozone NAAQS, with the exception of the visibility requirements of section 110(a)(2)(D)(i)(II), and the portions of sections 110(a)(2)(C), D(i)(II), and (J) related to GHG PSD permitting. With respect to Florida's infrastructure SIP submission related to the visibility requirements of section 110(a)(2)(D)(i)(II), EPA will act on this portion of the submission in a separate action. With respect to the portions of sections 110(a)(2)(C), D(i)(II), and (J) related to GHG PSD permitting requirements, EPA is proposing to disapprove Florida's submission related to these requirements. This action is not approving any specific rule, but rather proposing that Florida's already approved SIP meets certain CAA requirements.

² As noted above, Florida withdrew the portions of its infrastructure SIP submission related to the requirements of section 110(a)(2)(D)(i)(I). As such, this proposed action does not address these requirements.

II. What Elements are Required Under Sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 2008 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with the 1997 8-hour ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are summarized below.³

³ Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.⁴
- 110(a)(2)(D): Interstate transport.⁵
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.⁶
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.

due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

⁴This rulemaking only addresses requirements for this element as they relate to attainment areas.

⁵In accordance with the panel of the U.S. Court of Appeals for the D.C. Circuit opinion, EPA at this time is not treating section 110(a)(2)(D)(i)(I) as a required SIP submission. *See EME Homer City generation, L.P. v. EPA*, 696 F.3d 7. Unless the *EME Homer City* decision is reversed or otherwise modified by the Supreme Court, states are not required to submit 110(a)(2)(D)(i)(I) SIPs until the EPA has quantified their obligations under that section. The portions of the SIP submission relating to 110(a)(2)(D)(i)(II) (also referred to as prongs 3 and 4) and 110(a)(2)(D)(ii), in contrast, are required. Prong 3 of 110(a)(2)(D)(i) and 110(a)(2)(D)(ii) are being acted upon by EPA in today's proposed rulemaking. Prong 4 of 110(a)(2)(D)(i) will be acted on in a separate action.

⁶As mentioned above, this element is not relevant to today's proposed rulemaking.

- 110(a)(2)(M): Consultation/participation by affected local entities.

III. Scope of Infrastructure SIPs

EPA notes that this rulemaking does not address four substantive issues that are not integral to the Florida infrastructure SIP submission. These four issues are: (i) existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources (SSM), that may be contrary to the CAA and EPA's policies addressing such excess emissions; (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (director's discretion); (iii) existing provisions for minor source new source review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (minor source NSR); and, (iv) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform).

Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in EPA's November 8, 2012, proposed rule entitled, "Approval and Promulgation of Implementation Plans; Florida; 110(a)(1) and (2) Infrastructure Requirements for the 1997 annual and 2006 24-hour Fine Particulate Matter National Ambient Air Quality Standards" in the section entitled, "Scope of Infrastructure SIPs." *See* 77 FR 66927.

IV. What is EPA’s Analysis of How Florida Addressed the Elements of Sections 110(a)(1) and (2) “Infrastructure” Provisions?

EPA is proposing to take two actions in response to Florida’s infrastructure SIP submission for the 2008 8-hour ozone NAAQS. FDEP’s infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): *Emission limits and other control measures*: There are several regulations within Florida’s SIP relevant to air quality control regulations which include enforceable emission limitations and other control measures. Chapters 62-204, *Air Pollution Control Provisions*; 62-210, *Stationary Sources – General Requirements*; and 62-296, *Stationary Sources – Emissions Standards*, establish emission limits for ozone and address the required control measures, means and techniques for compliance with the ozone NAAQS respectively. EPA has made the preliminary determination that the provisions contained in these chapters and Florida’s practices are adequate to protect the 2008 8-hour ozone NAAQS in the State.

In this action, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (September 20, 1999), and the Agency plans to address such state regulations in a separate action.⁷ In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

⁷ On February 22, 2013, EPA published a proposed action in the Federal Register entitled, “State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule.”

Additionally, in this action, EPA is not proposing to approve or disapprove any existing State rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) *Ambient air quality monitoring/data system:* Chapters 62-204, *Air Pollution Control Provisions*; 62-210, *Stationary Sources – General Requirements*; 62-212, *Stationary Sources – Preconstruction Review*; 62-296, *Stationary Sources – Emissions Standards*; and 62-297, *Stationary Sources – Emissions Monitoring*, of the Florida SIP, along with the Florida Network Description and Ambient Air Monitoring Network Plan, provide for an ambient air quality monitoring system in the State. Annually, EPA approves the ambient air monitoring network plan for the state agencies. In May 2012, Florida submitted its monitoring network plan to EPA, and on September 11, 2012, EPA approved this plan. Florida's approved monitoring network plan can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2012-0692. EPA has made the preliminary determination that Florida's SIP and practices are adequate for the ambient air quality monitoring and data system related to the 2008 8-hour ozone NAAQS.

3. 110(a)(2)(C) *Program for enforcement of control measures including review of proposed new sources:* Florida's authority to regulate new and modified sources of the ozone precursors volatile organic compounds (VOCs) and nitrogen oxides (NOx) to assist in the protection of air quality in nonattainment, attainment or unclassifiable areas is established in Chapters 62-210,

Stationary Sources – General Requirements, Section 200 – Definitions; and 62-212, *Stationary Sources – Preconstruction Review, Section 400 - Prevention of Significant Deterioration*, of the Florida SIP.

At present, there are four SIP revisions that are relevant to EPA’s review of FDEP’s infrastructure SIP submission for the 2008 8-hour ozone NAAQS in connection with the current PSD-related infrastructure requirements. *See* sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) of the CAA. The EPA regulations that require these SIP revisions are: 1) “Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule” (November 29, 2005, 70 FR 71612) (hereafter referred to as the “Phase II Rule”); 2) “Prevention of Significant Deterioration and Title V Greenhouse Gas [GHG] Tailoring Rule; Final Rule” (June 3, 2010, 75 FR 31514) (hereafter referred to as the “GHG Tailoring Rule”); 3) “Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers; Final Rule” (May 16, 2008, 73 FR 28321) (hereafter referred to as the “NSR PM_{2.5} Rule”); and, 4) “Final Rule on the Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC); Final Rule” (October 20, 2010, 75 FR 64864) (hereafter referred to as the “PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments)”).

On October 19, 2007, and July 1, 2011, FDEP submitted revisions to EPA for approval into the Florida SIP to adopt federal requirements for NSR permitting promulgated in the Phase II Rule. FDEP’s submittal addressed the structural PSD program revisions required by the Phase II Rule, including requirements to include NO_x as an ozone precursor for permitting purposes for PSD and nonattainment NSR. EPA published a final action approving FDEP’s revisions which

incorporate NO_x as an ozone precursor on June 15, 2012. *See* 77 FR 35862. Thus, EPA has preliminarily determined that the infrastructure SIP submission is approvable with respect to this issue.

The second revision pertains to revisions to the PSD program promulgated in EPA's June 3, 2010, Greenhouse Gas Tailoring Rule or "GHG Tailoring Rule." *See* 75 FR 31514. Florida did not submit a SIP revision to adopt the appropriate emission thresholds for determining which new stationary sources and modification projects become subject to PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule. Therefore, Florida's federally-approved SIP contained errors that resulted in its failure to address, or provide adequate legal authority for, the implementation of a GHG PSD program in Florida. Approval of a revision to address GHG is required to meet 110(a)(2)(C). In the GHG SIP Call,⁸ EPA determined that the State of Florida's SIP was substantially inadequate to achieve CAA requirements because its existing PSD program does not apply to GHG-emitting sources; the rule finalized a finding to the effect and promulgated SIP call for 15 state and local permitting authorities including Florida. EPA explained that if a state, such as Florida, identified in the SIP call, failed to submit the required corrective SIP revision by the applicable deadline, EPA would promulgate a FIP under CAA section 110(c)(1)(A) for that state to govern PSD permitting for GHG. On December 30, 2010, EPA promulgated a FIP⁹ for Florida because the State failed to submit, by its December 22, 2010, deadline, the corrective SIP revision to apply its PSD program

⁸ Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, Final Rule, 75 FR 77698 (December 13, 2010).

⁹ Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

to sources of GHG consistent with the thresholds described in the GHG Tailoring rule. The FIP ensured that a permitting authority (i.e., EPA) would be available to issue preconstruction PSD permits to GHG-emitting sources in the State of Florida. EPA took these actions through interim final rulemaking, effective upon publication, to ensure the availability of a permitting authority – EPA – in Florida for GHG-emitting sources when they became subject to PSD on January 2, 2011.

Since Florida currently does not have adequate legal authority in its SIP to address the GHG PSD permitting requirements established in the GHG Tailoring Rule, or at other appropriate levels, it does not satisfy portions of elements of the infrastructure requirements. As a result, EPA is proposing disapproval of FDEP's submission for the portions of infrastructure elements 110(a)(2)(C), (D)(i)(II), and (J) related to GHG PSD permitting requirements. EPA's proposed disapproval of these elements, if finalized, would not result in any further obligation on the part of Florida because EPA has already promulgated a FIP for the Florida PSD program to address permitting GHGs at or above the GHG Tailoring Rule thresholds. *See* 76 FR 25178. Thus, today's proposed action to disapprove FDEP's submission for sections 110(a)(2)(C), (D)(i)(II), and (J) as they relate to GHG PSD permitting requirements, once final, will not require any further action by either FDEP or EPA.

The third and fourth revisions pertain to the adoption of PSD and Nonattainment New Source Review (NNSR) requirements related to the implementation of the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments). On March 15, 2012, FDEP submitted revisions to its PSD/NSR regulations for EPA approval to revise Florida's SIP and adopt required federal PSD permitting provisions governing the implementation of the NSR program for PM_{2.5} as promulgated in the NSR PM_{2.5} Rule and PM_{2.5}

increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. Approval of these regulations into the SIP address the relevant requirements of sections 110(a)(2)(C), (D)(i)(II), and (J). EPA finalized approval of Florida's March 15, 2012, submittal on September 19, 2012. *See* 77 FR 58027.

EPA notes that on September 19, 2012, the Agency approved the SMC portion of the PM_{2.5} PSD Increment-SILs-SMC Rule into the Florida SIP. *See* 77 FR 58027. Since that time, on January 22, 2013, the U.S. Court of Appeals for the District of Columbia, issued a decision that, *inter alia*, vacated the provisions adding the PM_{2.5} SMC to the federal regulations, at 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c), that were promulgated as part of the 2010 PM_{2.5} PSD Increment-SILs-SMC Rule. *See Sierra Club v. EPA*, 703 F.3d 458 (D.C. Cir. 2013). In its decision, the court held that EPA did not have the authority to use SMCs to exempt permit applicants from the statutory requirement in section 165(e)(2) of the CAA that ambient monitoring data for PM_{2.5} be included in all PSD permit applications. Thus, although the PM_{2.5} SMC was not a required element of a State's PSD program and thus not a structural requirement for purposes of infrastructure SIPs, were a SIP-approved PSD program that contains such a provision to use that provision to issue new permits without requiring ambient PM_{2.5} monitoring data, such application of the SIP would be inconsistent with the court's opinion and the requirements of section 165(e)(2) of the CAA.

Given the clarity of the court's decision, it would now be inappropriate for Florida to continue to allow applicants for any pending or future PSD permits to rely on the PM_{2.5} SMC in order to avoid compiling ambient monitoring data for PM_{2.5}. Because of the vacatur of the EPA regulations, the SMC provisions included in Florida's SIP-approved PSD programs on the basis of EPA's regulations are unlawful and no longer enforceable by law. Permits issued on the basis

of these provisions as they appear in approved SIPs would be inconsistent with the CAA and difficult to defend in administrative and judicial challenges. Thus, the SIP provisions may not be applied even prior to their removal from the SIP. Florida should instead require applicants requesting a PSD permit, including those having already been applied for but for which the permit has not yet been received, to submit ambient PM_{2.5} monitoring data in accordance with the CAA requirements whenever either direct PM_{2.5} or any PM_{2.5} precursor is emitted in a significant amount.¹⁰ As the previously-approved PM_{2.5} SMC provisions in the Florida SIP are no longer enforceable, EPA does not believe the existence of the provisions in the State's SIP precludes today's proposed approval of portions of the infrastructure SIP submission for Florida as it relates to the 2008 8-hour ozone NAAQS.

EPA intends to initiate a rulemaking to correct SIPs that were approved with regard to the PM_{2.5} SMCs prior to the court's decision. EPA also advises the States to begin preparations to remove the PM_{2.5} SMC provisions from their state PSD regulations and SIPs. However, EPA has not yet set a deadline requiring States to take action to revise their existing PSD programs to address the court's decision.

These SIP revisions and the FIP for GHG¹¹ address requisite requirements of infrastructure elements 110(a)(2)(C), D(i)(II), and (J). The FIP that is currently in place to

¹⁰ In lieu of the applicants' need to set out PM_{2.5} monitors to collect ambient data, applicants may submit PM_{2.5} ambient data collected from existing monitoring networks when the permitting authority deems such data to be representative of the air quality in the area of concern for the year preceding receipt of the application. EPA believes that applicants will generally be able to rely on existing representative monitoring data to satisfy the monitoring data requirement.

¹¹ (1) EPA's approval of Florida's PSD/NSR regulations which address the Ozone Implementation NSR Update requirements, (2) EPA's FIP for PSD GHG Tailoring Rule revisions which addresses the thresholds for GHG permitting applicability in Florida, (3) EPA's approval of Florida's NSR PM_{2.5} Rule, and (4) EPA's approval of Florida's PM_{2.5} PSD Increment-SILs-SMC Rule.

address GHG requirements in Florida will remain until Florida submits a final submission to EPA for federal approval and EPA takes final action on the submission.

Finally, EPA notes that today's action is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

EPA has made the preliminary determination that Florida's SIP and practices are adequate for program enforcement of control measures including review of proposed new sources related to the 2008 8-hour ozone NAAQS. For the portion of this element that EPA is disapproving related to GHG PSD permitting requirements, EPA has made the preliminary determination that the already promulgated FIP for Florida is adequate for program enforcement of control measures including review of proposed new sources related to the 2008 8-hour ozone NAAQS.

4. 110(a)(2)(D)(i) and (ii) *Interstate and International transport provisions*: Section

110(a)(2)(D) has two components; 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) includes four distinct components, commonly referred to as "prongs," that must be addressed in SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are

provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (“prong 1”), and interfering with maintenance of the NAAQS in another state (“prong 2”). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state interfering with measures required to prevent significant deterioration of air quality in another state (“prong 3”), or to protect visibility in another state (“prong 4”). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. EPA’s analysis of FDEP’s infrastructure submission with regard to the requirements of 110(a)(2)(D) is as follows:

110(a)(2)(D)(i)(I): Florida does not currently have a section 110(a)(2)(D)(i)(I) submission for the 2008 8-hour ozone NAAQS before the Agency.¹² However, in accordance with the panel of the U.S. Court of Appeals for the D.C. Circuit opinion, a SIP submission addressing section 110(a)(2)(D)(i)(I) from the State of Florida is not currently required. *See EME Homer City*, 696 F.3d 7. The opinion in *EME Homer City* concluded that EPA cannot promulgate a FIP to address the requirements of 110(a)(2)(D)(i)(I) for a state until EPA has first quantified the emissions that must be prohibited under that provision. *See EME Homer City*, 696 F.3d at 28 (“explaining that EPA must, after quantifying state’s obligations under section 110(a)(2)(D)(i)(I) give states an initial opportunity to implement the obligations through SIPs”). As such, the lack of a submission from Florida does not currently trigger a FIP pursuant to section 110(c)(1) unless the *EME Homer City* decision is reversed or otherwise modified by the Supreme Court.

¹² As previously described, Florida withdrew this portion of its infrastructure submission related to section 110(a)(2)(D)(i)(I) on April 30, 2013.

110(a)(2)(D)(i)(II) – prong 3: With regard to prong 3 of section 110(a)(2)(D)(i), this requirement may be met by the state’s confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to a PSD program meeting all the current structural requirements of part C of title I of the CAA or (if the state contains a nonattainment area for the relevant pollutant) to a NNSR program that implements the 2008 8-hour ozone NAAQS. As discussed in more detail above with respect to section 110(a)(2)(C), FDEP’s infrastructure SIP submission describes the PSD Program provisions contained in for Florida’s SIP that provide the necessary structural PSD requirements to satisfy prong 3 requirements, with the exception of those necessary to address GHG permitting. Because the Florida SIP does not currently provide adequate legal authority to address GHG PSD permitting requirements, EPA is proposing disapproval of the Florida prong 3 infrastructure SIP submission related to the GHG PSD permitting requirements. As previously described, EPA has promulgated a FIP for Florida addressing these GHG permitting requirements, and as such, EPA’s proposed disapproval, if finalized, would not result in further obligations on the part of Florida because the FIP addresses the permitting of GHGs at or above the applicable Tailoring Rule thresholds. *See* 75 FR 82246.

EPA has preliminarily determined that the Florida SIP meets the relevant PSD program requirements, with the exception of those for pertaining to GHG. Accordingly, in this action EPA is proposing to approve in part, and disapprove in part, Florida’s infrastructure SIP submission as meeting the applicable requirements of prong 3 of section 110(a)(2)(D)(i).

110(a)(2)(D)(i)(II) – prong 4: Prong 4 of section 110(a)(2)(D)(i) requires that SIPs include provisions prohibiting any source or other type of emissions activity in one state from interfering

with measures to protect visibility in another state. In this rulemaking, EPA is not proposing any action on prong 4 and instead will do so in a separate action.

110(a)(2)(D)(ii) *Interstate and International transport provisions:* With regard to 110(a)(2)(D)(ii), Chapter 62-210, *Stationary Sources – General Requirements* of the Florida SIP outlines how Florida will notify neighboring states of potential impacts from new or modified sources. EPA is unaware of any pending obligations for the State of Florida pursuant to sections 115 or 126 of the CAA. EPA has made the preliminary determination that Florida’s SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 2008 8-hour ozone NAAQS.

5. 110(a)(2)(E) *Adequate resources:* Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions.

In support of EPA’s proposal to approve sections 110(a)(2)(E)(i), (ii), and (iii), EPA notes that FDEP is responsible for promulgating rules and regulations for the NAAQS, emissions standards general policies, a system of permits, and fee schedules for the review of plans, and other planning needs. As evidence of the adequacy of FDEP’s resources, EPA submitted a letter to Florida on February 28, 2013, outlining 105 grant commitments and the current status of these commitments for fiscal year 2012. The letter EPA submitted to Florida can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2012-0692. Annually, states update

these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. Florida satisfactorily met all commitments agreed to in the Air Planning Agreement for fiscal year 2012, therefore Florida's grants were finalized. On July 30, 2012, EPA approved Florida statutes into the SIP to comply with section 128 respecting state boards. *See* 77 FR 44485. EPA has made the preliminary determination that Florida has adequate resources for implementation of the 2008 8-hour ozone NAAQS.

6. 110(a)(2)(F) *Stationary source monitoring system*: Florida's infrastructure submission describes how the State establishes requirements for emissions compliance testing and utilizes emissions sampling and analysis. It further describes how the State ensures the quality of its data through observing emissions and monitoring operations. Florida FDEP uses these data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with emission regulations and additional EPA requirements. These requirements are provided in Chapters 62-210, *Stationary Sources – General Requirements*; 62-212, *Stationary Sources – Preconstruction Review*; 62-296, *Stationary Sources – Emissions Standards*; and 62-297, *Stationary Sources – Emissions Monitoring*.

Additionally, Florida is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually

through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them – nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Florida made its latest update to the NEI on February 27, 2013. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Florida's SIP and practices are adequate for the stationary source monitoring systems related to the 2008 8-hour ozone NAAQS.

7. 110(a)(2)(G) *Emergency power:* Florida's infrastructure SIP submission identifies air pollution emergency episodes and preplanned abatement strategies as outlined in Florida Statutes 403.131 and 120.569(2)(n). These statutes were submitted for inclusion to the SIP to address the requirements of section 110(a)(2)(G) of the CAA and have been approved by EPA on July 30, 2012. *See* 77 FR 44485. EPA has made the preliminary determination that Florida's SIP and practices are adequate for emergency powers related to the 2008 8-hour ozone NAAQS.

8. 110(a)(2)(H) *Future SIP revisions:* FDEP is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Florida. FDEP has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS. Florida does not have any nonattainment areas for the 2008 8-hour ozone standard but has made an infrastructure submission for this standard, which is the subject of this rulemaking. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 2008 8-hour ozone NAAQS when necessary.

9. 110(a)(2)(J): EPA is proposing to approve in part, and disapprove in part, Florida's infrastructure SIP for the 2008 8-hour ozone NAAQS with respect to the requirements in section 110(a)(2)(J) to include a program in the SIP that provides for meeting the applicable consultation requirements of section 121, the public notification requirements of section 127, and the PSD and visibility protection requirements of part C of the Act.

110(a)(2)(J) (121 consultation) *Consultation with government officials:* Chapters 62-204, *Air Pollution Control Provisions* and 62-212, *Stationary Sources – Preconstruction Review*, as well as Florida's Regional Haze Implementation Plan (which allows for consultation between appropriate state, local, and tribal air pollution control agencies as well as the corresponding Federal Land Managers), provide for consultation with government officials whose jurisdictions might be affected by SIP development activities. Florida adopted state-wide consultation procedures for the implementation of transportation conformity. These consultation procedures include considerations associated with the development of mobile inventories for SIPs. Implementation of transportation conformity as outlined in the consultation procedures requires FDEP to consult with federal, state and local transportation and air quality agency officials on the development of motor vehicle emissions budgets. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate consultation with government officials related to the 2008 8-hour ozone NAAQS when necessary.

110(a)(2)(J) (127 public notification) *Public notification:* FDEP has public notice mechanisms in place to notify the public of ozone and other pollutant forecasting, including an air quality monitoring website providing ground level ozone alerts, http://www.dep.state.fl.us/air/air_quality/countyqi.htm. Florida also has state statutes, 403.131,

Injunctive relief, remedies and 120.569(n) (relating to emergency orders) which allow the state to seek injunctive relief to prevent irreparable damage to air quality. In addition, the Florida SIP contains federally-approved provisions to monitor air pollution episodes for ozone and particulate matter contained in Chapter 62-256.300, *Prohibitions*. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to provide public notification related to the 2008 8-hour ozone NAAQS when necessary.

110(a)(2)(J) (PSD) PSD: Florida's authority to regulate new and modified sources of the ozone precursors VOCs and NO_x to assist in the protection of air quality in nonattainment, attainment or unclassifiable areas is established in Chapters 62-210, *Stationary Sources – General Requirements, Section 200 – Definitions*, and 62-212, *Stationary Sources – Preconstruction Review, Section 400 - Prevention of Significant Deterioration* of the Florida SIP. Accordingly, as with the PSD related elements of the infrastructure SIP, this portion of element (J) also requires compliance with the Phase II Rule, the GHG Tailoring Rule, the NSR PM_{2.5} Rule, and the PM_{2.5} PSD Increment-SILs-SMC Rule. EPA has approved into the Florida SIP or has promulgated a FIP to address each of these requirements, and as such, the requisite PSD-related requirements of infrastructure element 110(a)(2)(J) have been addressed. However, as with infrastructure elements 110(a)(2)(C), and prong 3 of 110(a)(2)(D)(i), EPA has preliminarily determined that FDEP's infrastructure SIP submission does not fully meet element 110(a)(2)(J) due to the existing GHG permitting FIP for Florida. As discussed in more detail above with respect to section 110(a)(2)(C), FDEP's SIP contains provisions for Florida's PSD program that reflect relevant SIP revisions of the structural PSD requirements with the exception of the authority to regulate new GHG PSD permitting requirements at or above the levels of emissions set in the GHG Tailoring Rule, or at other appropriate levels. On December 30, 2010, EPA

promulgated a FIP¹³ for those states including Florida, because they failed to submit, a corrective SIP revision to apply its PSD program to sources of GHG consistent with the thresholds described in the GHG Tailoring rule.

EPA has preliminarily determined that the Florida SIP meets the relevant PSD program requirements, with the exception of those for pertaining to GHG. Accordingly, in this action EPA is proposing to approve in part, and disapprove in part, Florida's infrastructure SIP submission as meeting the applicable requirements of 110(a)(2)(J). As previously described, EPA's proposed disapproval of section 110(a)(2)(J) related to GHG PSD permitting, if finalized, would not result in further obligations on the part of Florida because the FIP addresses the permitting of GHGs at or above the applicable Tailoring Rule thresholds. *See* 75 FR 82246.

110(a)(2)(J) *Visibility protection:* With regard to the visibility protection aspect of 110(a)(2)(J), EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, EPA finds that there are no applicable visibility obligations under part C “triggered” under section 110(a)(2)(J) when a new NAAQS becomes effective. Florida has submitted SIP revisions to satisfy the requirements of the CAA Section 169A and 169B, and the regional haze and BART rules contained in 40 CFR 51.308. On November 29, 2012, EPA published a final rulemaking approving certain BART determinations under Florida's regional haze program. *See* 77 FR 71111. EPA has proposed full approval of the remaining aspects of

¹³ Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

Florida's regional haze program on December 10, 2012. *See* 77 FR 73369. In EPA's view, the current status of Florida's regional haze SIP as having not been fully approved is not a bar to full approval of the infrastructure SIP submission with respect to the visibility protection aspect of 110(a)(2)(J), and EPA is proposing to fully approve the infrastructure SIP for this aspect.

10. 110(a)(2)(K) *Air quality and modeling/data:* Chapter 62-204.800, *Federal Regulations Adopted by Reference*, incorporates by reference 40 CFR 52.21(l), which specifies that air modeling be conducted in accordance with 40 CFR part 51, Appendix W "Guideline on Air Quality Models." These regulations demonstrate that Florida has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 8-hour ozone NAAQS. Additionally, Florida supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 1997 8-hour ozone NAAQS, for the Southeastern states. Taken as a whole, Florida's air quality regulations demonstrate that FDEP has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 8-hour ozone NAAQS. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to provide for air quality and modeling, along with analysis of the associated data, related to the 2008 8-hour ozone NAAQS when necessary.

11. 110(a)(2)(L) *Permitting fees:* Florida addresses the review of construction permits as previously discussed in 110(a)(2)(C). Permitting fees in Florida are collected through the State's federally-approved title V fees program, according to State regulation 403.087(6)(a), *Permit Fees*. EPA has made the preliminary determination that Florida's SIP and practices adequately provide for permitting fees related to the 2008 8-hour ozone NAAQS when necessary.

12. 110(a)(2)(M) Consultation/participation by affected local entities: Chapter 62-204, *Air Pollution Control Provisions*, requires that SIPs be submitted in accordance with 40 CFR part 51, Subpart F, for permitting purposes. Florida statute 403.061(21) authorizes FDEP to “[a]dvise, consult, cooperate and enter into agreements with other agencies of the state, the Federal Government, other states, interstate agencies, groups, political subdivisions, and industries affected by the provisions of this act, rules, or policies of the department.” Furthermore, FDEP has demonstrated consultation with, and participation by, affected local entities through its work with local political subdivisions during the developing of its Transportation Conformity SIP and Regional Haze Implementation Plan. EPA has made the preliminary determination that Florida’s SIP and practices adequately demonstrate consultation with affected local entities related to the 2008 8-hour ozone NAAQS when necessary.

V. Proposed Action

As described above, Florida has addressed the elements of the CAA section 110(a)(1) and (2) SIP requirements being proposed for approval to ensure that the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida. EPA is now proposing two related actions on Florida’s October 31, 2011, submission. First, EPA is proposing to approve Florida’s infrastructure submission for the applicable requirements of the 2008 8-hour ozone NAAQS, with the exception prong 4 of section 110(a)(2)(D)(i), and the portions of sections 110(a)(2)(C), prong 3 of D(i), and (J) related to GHG PSD permitting. With respect to Florida infrastructure SIP submission related to prong 4 of section 110(a)(2)(D)(i), EPA will act on this portion of the submission in a separate action. With respect to the portions of sections 110(a)(2)(C), prong 3 of

D(i) and (J) related to GHG PSD permitting requirements, EPA is proposing to disapprove Florida's submission related to these requirements.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 6, 2013

A. Stanley Meiburg

Acting Regional Administrator,

Region 4.

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